Supreme Court, U.S.
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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CLINTWOOD ELKHORN MINING COMPANY, GATLIFF COAL COMPANY, AND PREMIER ELKHORN COAL COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a taxpayer who would have been entitled to file a tax refund action in federal court to seek a refund of taxes (and interest thereon), but who failed to satisfy a statutory prerequisite to such an action (namely, the filing of a timely administrative refund claim) and is therefore barred from bringing such an action, may obtain a refund, and interest thereon, through an action directly under the Constitution pursuant to the Tucker Act, 28 U.S.C. 1491(a).

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-6a) is reported at 473 F.3d 1373. The opinion of the Court of Federal Claims (App., *infra*, 11a-28a) is reported at 54 Fed. Cl. 563, and a subsequent order (App., *infra*, 10a) and the judgment (App., *infra*, 7a-9a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 2007. A petition for rehearing was denied

on April 27, 2007 (App., *infra*, 29a-30a). On July 17, 2007, Chief Justice Roberts extended the time within which to file a petition for a writ of certiorari to and including September 9, 2007 (Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth in an appendix to the petition. App., *infra*, 43a-47a.

STATEMENT

1. In 2000, the Internal Revenue Service (IRS) acquiesced in a holding by a federal district court that an excise tax on coal (26 U.S.C. 4121(a)) violated the Export Clause of the Constitution, Art. I, § 9, Cl. 5, as applied to sales of coal that were in the stream of export and subsequently exported. See App., *infra*, 2a. In its acquiescence, the IRS stated that the tax would not be imposed on exported coal, and that the IRS would refund any tax paid on exported coal if the taxpayer filed a timely administrative claim for refund of the tax. See I.R.S. Notice 2000-28, 2000-1 C.B. 1116; App., *infra*, 12a.

Section 7422(a) of the Internal Revenue Code provides that "[n]o suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected" unless the taxpayer has "duly filed" with the IRS an administrative claim for a tax refund. 26 U.S.C. 7422(a). Section 6511(a) provides that an administrative "[c]laim for credit or refund of an overpayment of any tax imposed by this [Title 26] * * * shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid,"

whichever is later. 26 U.S.C. 6511(a). Section 6511(b)(1) further provides that "[n]o credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period." 26 U.S.C. 6511(b)(1). Section 6532(a), in turn, mandates that "[n]o suit or proceeding under section 7422(a) for the recovery of any internal revenue tax * * * shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time," but any refund suit must be begun within two years after the date of the IRS's disallowance of the refund claim, although that period can be extended by agreement. 26 U.S.C. 6532(a)(1) and (2).

In addition, 28 U.S.C. 2411 provides in pertinent part that, "[i]n any judgment of any court rendered * * * for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under section 6621 of the Internal Revenue Code of 1986 upon the amount of the overpayment." It further establishes that interest shall run "from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue." *Ibid.*

In *Cyprus Amax Coal Co.* v. *United States*, 205 F.3d 1369 (2000), cert. denied, 532 U.S. 1065 (2001), the Federal Circuit held that a taxpayer may maintain a suit for money damages directly under the Export Clause (invoking jurisdiction under the Tucker Act, 28 U.S.C. 1491(a)) as an "alternative avenue[ ]" to "a tax refund action," and that such an "alternate" action is "not sub-

ject to compliance with the tax refund statute." *Cyprus Amax*, 205 F.3d at 1373-1376; see U.S. Const. Art. I, § 9, Cl. 5 ("No Tax or Duty shall be laid on Articles exported from any State."). The court reasoned that the "necessary implication of the Export Clause's unqualified proscription is that the remedy for its violation entails a return of money unlawfully exacted." 205 F.3d at 1373. It thus held that the Export Clause is "self-executing; that is, * * * a party can recover for payment of taxes under the Export Clause independent of the tax refund statute." *Id.* at 1374. The court further concluded that such a suit was subject to the general six-year limitation period of 28 U.S.C. 2501 for suits under the Tucker Act, rather than the shorter statute of limitations prescribed by 26 U.S.C. 6511(a) for filing a timely administrative "[c]laim for * * * refund of an overpayment of any tax" as a prerequisite to suit. *Cyprus Amax*, 205 F.3d at 1372-1373.

2. Respondents filed timely administrative claims for refund of tax paid on exported coal for tax years 1997, 1998, and 1999, and the IRS refunded those taxes, including interest. Respondents failed, however, to file timely administrative refund claims for $1,065,936 in coal tax on exports for tax years 1994, 1995, and 1996. Consequently, the IRS did not refund those taxes. App., *infra*, 3a, 9a; Gov't C.A. Br. 3 & n.3. Respondents filed this suit in the Court of Federal Claims seeking "damages consisting of a refund" of the excise tax not refunded, and "appropriate interest, costs, and attorney's fees." App., *infra*, 37a-38a.

The Court of Federal Claims, relying on *Cyprus Amax*, allowed respondents to pursue their monetary claims directly under the Export Clause and to avail themselves of the general six-year statute of limitations

in the Tucker Act, 28 U.S.C. 2501, notwithstanding their failure to file timely administrative refund claims. App., *infra*, 14a. The court, however, denied respondents' request for interest on their claims. *Id.* at 14a-28a. It concluded that respondents could not recover interest under 28 U.S.C. 2411 because their claims were ones "for damage under the Export Clause rather than * * * tax refunds pursuant to the Tax Code." App., *infra*, 17a. The court rejected respondents' argument that they could "avoid the shorter statute of limitations, and the administrative requirements of the tax refund statutes by using the Export Clause for jurisdiction, while returning to the tax statutes to obtain interest pursuant to § 2411." *Ibid.*[1]

In a subsequent order, the court denied the government's request to dismiss respondents' claims with respect to tax periods as to which respondents failed to file timely administrative refund claims or, in the alternative, to limit respondents' recovery to those claims falling within the three-year limitation period of Section 6511(a). App., *infra*, 10a; see *id.* at 41a-42a. The court entered judgment for respondents in the stipulated amount of $1,065,936, without interest. *Id.* at 7a.

3. On cross-appeals, the court of appeals affirmed in part and reversed in part. App., *infra*, 1a-6a. Rejecting the government's request for an initial hearing en banc, the court expressly declined to reconsider its decision in *Cyprus Amax*, *id.* at 2a-3a, holding that respondents "could either proceed in court under the Tucker Act, or seek an administrative tax refund under the Tax Code." *Id.* at 3a. The court observed that "[a] consequence of

[1] The court also rejected respondents' arguments that the Export Clause and other constitutional provisions mandated the payment of interest. App., *infra*, 19a-27a.

Tucker Act jurisdiction is that the statute of limitations is six years, 28 U.S.C. § 2501, whereas refund claims brought administratively to the Internal Revenue Service are limited to recovery of overpayments for the preceding three years." *Ibid.* (citing 26 U.S.C. 6511(a)). The court therefore held that, in addition to the tax years 1997 through 1999 for which respondents had filed administrative claims, they could also seek recovery for the tax years 1994 through 1996 under the longer six-year statute of limitations. *Ibid.*

The court of appeals further held that Section 2411 entitled respondents to recover interest on their claims for the earliest three tax years, 1994 through 1996, notwithstanding their failure to file timely administrative claims for those years. App., *infra*, 3a-6a.[2] The court reasoned that Section 2411 "is a straightforward recognition that the government should pay for its use of a taxpayer's money to which the government was not entitled." *Id.* at 5a. And the court concluded that, regardless of whether respondents filed an administrative claim, the judgment awarded to them was "for" an "overpayment" of tax within the meaning of Section 2411, and that they therefore were entitled to interest "on the refunded export taxes for the entire period of recovery." *Id.* at 6a.

4. The government filed a petition for rehearing en banc, arguing *inter alia* that the decision of the court of appeals was inconsistent with *Hinck* v. *United States*, 446 F.3d 1307 (Fed. Cir. 2006), aff'd, 127 S. Ct. 2011 (2007), and *EC Term of Years Trust* v. *United States*, 434 F.3d 807 (5th Cir. 2006), aff'd, 127 S. Ct. 1763 (2007),

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[2] The court noted that the government did not dispute entitlement to interest for the years 1997 through 1999 "because an administrative claim was filed for those years." App., *infra*, 4a.

both of which were then pending before this Court. On April 27, 2007, the court of appeals denied the petition for rehearing en banc. App., *infra*, 29a-30a.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals is incorrect, and conflicts with the "well-established principle that, in most contexts, 'a precisely drawn, detailed statute pre-empts more general remedies.'" *Hinck* v. *United States*, 127 S. Ct. 2011, 2015 (2007) (quoting *EC Term of Years Trust* v. *United States*, 127 S. Ct. 1763, 1767 (2007)). The court of appeals erred in permitting respondents to recover tax overpayments through resort to an action directly under the Export Clause and thereby to evade the detailed and carefully reticulated tax refund scheme created by Congress, including its mandatory administrative claims process and its shorter and more specific statute of limitations. The court compounded that error by allowing respondents to benefit from one portion of the comprehensive tax-refund remedy—namely, the allowance of interest—despite their failure to comply with the statutory prerequisites to relief under that remedial scheme.

The question presented is an important one. Given the nationwide jurisdiction of the Court of Federal Claims, any taxpayer in respondent's situation (and potentially any taxpayer with a constitutionally-based claim) can simply re-label its tax refund claims as constitutional claims subject to the Tucker Act, 28 U.S.C. 1491, and thereby evade the limitations imposed by Congress on the scope of the government's waiver of sovereign immunity in the tax context. Moreover, there are more than 25 similar cases currently pending that, under the decision below, expose the United States to sub-

stantial liability for refunds and associated interest despite the taxpayers' failure to comply with those statutory prerequisites.

The court of appeals reached its decision without the benefit of this Court's decisions in *EC Term of Years* and *Hinck*, both of which held that Congress's provision of a specifically tailored remedy under the Internal Revenue Code precludes resort to a more general (and more generous) remedy. Indeed, in both cases the Court rejected attempts by taxpayers to utilize the Tucker Act's grant of jurisdiction as a basis for evading the limitations imposed by Congress on a specific and directly applicable remedial scheme. In this case, by contrast, the court of appeals erroneously authorized just such an evasion. It would therefore be appropriate for this Court to vacate the judgment of the court of appeals and remand for reconsideration in light of those decisions. In the alternative, the petition should be granted and the case set for briefing and oral argument.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS, INCLUDING THE INTERVENING DECISIONS IN *EC TERM OF YEARS* AND *HINCK*

A. This Court Recently Reaffirmed And Applied In The Tax Context The Principle That A Precisely Drawn, Detailed Remedy Precludes Resort To A More General Remedy

Subsequent to the court of appeals' denial of en-banc review in this case, this Court held in *EC Term of Years* that a party could not evade the specific restrictions, including a shorter limitations period, of a tax remedial scheme that was "better-fitted" to its claims by resorting to the more generous terms of the Tucker Act, 28 U.S.C. 1346(a)(1). 127 S. Ct. at 1767. In that case, a trust sought to challenge a government levy on its prop-

erty that was designed to collect the taxes owed by a taxpayer other than the trust. *Id.* at 1766. Having failed to bring a timely action under 26 U.S.C. 7426—which provides for wrongful-levy actions by third parties in the trust's situation—the trust instead brought a tax refund suit in federal district court, relying on the Tucker Act's general tax refund jurisdiction, 28 U.S.C. 1346(a)(1), and the relatively longer limitation period for tax refund suits. *EC Term of Years*, 127 S. Ct. at 1766-1767 & n.2.

This Court rejected that attempt, holding that "a precisely drawn, detailed statute pre-empts more general remedies," and that the preemption principle is further "brace[d] * * * when resort to a general remedy would effectively extend the limitations period for the specific one." *EC Term of Years*, 127 S. Ct. at 1767 (quoting *Brown* v. *GSA*, 425 U.S. 820, 834 (1976)). The Court reasoned that "if third parties could avail themselves of the general tax refund jurisdiction of § 1346(a)(1), they could effortlessly evade the levy statute's 9-month limitations period." *Id.* at 1767-1768.

Similarly, the Court held in *Hinck* that 26 U.S.C. 6404(h) (Supp. IV 2004), which permits a taxpayer to challenge in the Tax Court the IRS's refusal to abate interest on unpaid tax liabilities, provides the exclusive means by which a taxpayer can bring such a challenge. 127 S. Ct. at 2014-2018. In so holding, the Court rejected the taxpayers' argument that they could also seek review of abatement-of-interest determinations "under statutes granting jurisdiction to the district courts and the Court of Federal Claims to review tax refund actions." *Id.* at 2016 (citing 28 U.S.C. 1346(a)(1), 1491(a)(1); 26 U.S.C. 7422(a)). Rather, the Court concluded, the "precisely drawn, detailed statute" of Sec-

tion 6404(h), including its provision of the Tax Court as "the forum for adjudication," preempted resort to the more general jurisdictional provisions of the Tucker Act. *Id.* at 2015. In so holding, the Court rejected the taxpayers' attempt to rely on one portion of the remedy afforded by Section 6404(h), namely "the portion specifying a standard of review," while "circumvent[ing] the other limiting feature Congress placed in the *same* statute—restrictions such as a shorter statute of limitations than general refund suits * * * or a net-worth ceiling for plaintiffs eligible to bring suit." *Ibid.*

B. The Judgment Of The Court Of Appeals Is Irreconcilable With *EC Term Of Years* And *Hinck*

The reasoning of *EC Term of Years* and *Hinck* applies with equal force here, and is irreconcilable with the decision below. Congress has established a careful and thorough remedial scheme to resolve the very type of claim asserted by respondents: the tax refund mechanism, which comprehensively provides for the refund of any internal revenue taxes alleged to have been illegally or erroneously assessed or collected. See App., *infra*, 37a-38a (complaint seeking "damages consisting of a refund"). That comprehensive scheme preempts resort to more general remedies, particularly those that are subject to a more generous statute of limitations, and it precludes respondents from relying on only one portion of that comprehensive scheme (the allowance of interest) while evading others.

1. Under the specific statutory scheme for tax refund claims, an administrative claim for a refund "of *any* tax imposed by * * * [Title 26]" (including the tax at issue here, 26 U.S.C. 4121(a)) "*shall* be filed by the taxpayer within 3 years from the time the return was filed

or 2 years from the time the tax was paid." 26 U.S.C. 6511(a) (emphases added). The statute further provides that "[*n*]*o* * * * *refund shall be allowed* * * * unless a claim for * * * refund is filed by the taxpayer within such period." 26 U.S.C. 6511(b) (emphasis added). This Court has noted the "unusually emphatic form" and "highly detailed technical matter" in which Section 6511 "sets forth its time limitations." *United States* v. *Brockamp*, 519 U.S. 347, 350 (1997) (refusing to apply equitable tolling to those limitations).

In addition, Section 7422(a) mandates that "[*n*]*o suit* or proceeding shall be maintained in *any court* for the recovery of *any internal revenue tax* alleged to have been erroneously or illegally assessed or collected * * * until a claim for refund or credit has been duly filed with" the IRS. 26 U.S.C. 7422(a) (emphases added). Once the requisite administrative claim has been filed, "[n]o suit or proceeding" for refund of the tax may be instituted until the claim has been disallowed, or for six months if a ruling on the claim is not forthcoming. 26 U.S.C. 6532(a)(1). Any tax refund action generally must be filed within two years after the date of the IRS's disallowance of the refund claim (although that period can be extended by agreement). 26 U.S.C. 6532(a)(1) and (2).

In the Tucker Act, Congress granted concurrent jurisdiction to the Court of Federal Claims and the federal district courts to hear tax refund claims. 28 U.S.C. 1346(a)(1), 1491(a).[3] Congress further provided that "in-

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[3] Section 1346(a)(1) provides district courts with original jurisdiction over "[a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected." Section 1491(a) provides the Court of Federal Claims with jurisdiction over "any claim against the United States

terest shall be allowed," in the event of "any judgment of any court rendered * * * for any overpayment in respect of any internal-revenue tax," at a rate established by 26 U.S.C. 6621 "from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days." 28 U.S.C. 2411.

Those provisions are all components of a carefully integrated remedial scheme. Accordingly, while Congress conferred jurisdiction to hear tax refund claims in "spacious terms," this Court has made clear that those jurisdictional grants "must be read in conformity with other statutory provisions which qualify a taxpayer's right to bring a refund suit upon compliance with certain conditions." *United States* v. *Dalm*, 494 U.S. 596, 601-602 (1990) (holding that the restrictions in Section 7422(a) and Section 6511(a) applied to a taxpayer's attempt to resort to Section 1346(a)(1)'s jurisdictional grant); see, *e.g.*, *Commissioner* v. *Lundy*, 516 U.S. 235, 240 (1996) (noting in dicta that "timely filing of a refund claim" pursuant to 26 U.S.C. 7422(a) is "a jurisdictional prerequisite" to bringing a refund suit in either the Court of Federal Claims or a federal district court); *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 272-273 (1931) (holding that failure to file an administrative refund claim barred a tax refund suit in the Court of Claims); *Baltimore & Ohio R.R.* v. *United States*, 260 U.S. 565 (1923) (same); *United States* v. *New York & Cuba Mail S.S. Co.*, 200 U.S. 488, 491-495 (1906) (sustaining the government's demurrer, in a tax refund suit

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founded either upon the Constitution, or any Act of Congress or any regulation of an executive department." See generally *Flora* v. *United States*, 362 U.S. 145, 151-152 (1960) (discussing historical development of Tucker Act jurisdiction in tax context).

alleging a conceded violation of the Export Clause, because the taxpayer failed to comply with the then-existing requirement that the challenged taxes be paid under protest).

The comprehensive remedial scheme for tax refund claims allows taxpayers an opportunity to challenge taxes that they contend have been erroneously or illegally collected, while ensuring the orderly administration and adjudication of such claims. Section 7422(a)'s claim-filing requirements serve both (1) to give the IRS notice of the nature of the claim and the specific facts upon which it is predicated, thereby permitting an administrative investigation and determination; and (2) to provide the IRS with an opportunity to correct any conceded errors, and if disagreement remains, to limit the scope of any ensuing litigation to those issues that the IRS has examined and is willing to defend. See, *e.g.*, *Felt & Tarrant Mfg. Co.*, 283 U.S. at 272. The prescribed time limits, see 26 U.S.C. 6511(a), 6532(a)(1), also ensure that claims are made promptly, and that the IRS has adequate time to review a claim before a suit is filed. Compare 26 U.S.C. 6532(a)(1) (allowing the IRS six months to review an administrative refund claim before suit can be filed) with Fed. R. Civ. P. 12(a)(3)(A) (allowing the United States 60 days to answer a judicial complaint).

2. Accordingly, as with the specific statutory tax remedies at issue in *EC Term of Years* and *Hinck*, Congress has enacted "a precisely drawn, detailed" statutory scheme specifically tailored to address respondents' claims for a refund. The detailed and reticulated tax refund scheme is comprehensive: it designates the fora for adjudication, requires an administrative claim, establishes intricate and inter-related limitation periods,

and authorizes judicial relief, including interest. Compare *EC Term of Years*, 127 S. Ct. at 1766, 1767-1768; *Hinck*, 127 S. Ct. at 2015. And, as in *EC Term of Years* and *Hinck*, the statutory restrictions serve the purpose of ensuring the fair and efficient administration of the tax system—purposes that would be frustrated by allowing resort to a more general remedy. *Hinck*, 127 S. Ct. at 2016-2017; *EC Term of Years*, 127 S. Ct. at 1766, 1767-1768. The inescapable conclusion mandated by this Court's recent precedents is that the specific tax refund remedy is exclusive and preempts respondents' attempt to rely on the Tucker Act's general jurisdictional grant while evading all of the specific limitations established by Congress in the tax context. *Ibid.*; see *Alexander* v. *Sandoval*, 532 U.S. 275, 290 (2001) ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.").[4]

In particular, the court of appeals' decision to permit respondents to proceed under the general jurisdictional grant of the Tucker Act, 28 U.S.C. 1491(a), subject only to the six-year limitation period established by 28 U.S.C. 2501, is directly at odds with *EC Term of Years*. In that case, the Court noted that the preemptive force of a specifically tailored remedial scheme is "brace[d] * * * when resort to a general remedy would effectively ex-

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[4] To be sure, in *EC Term of Years* and *Hinck*, the general remedy to which resort was precluded was the tax refund remedy, whereas here the tax refund remedy is the specific remedy that would preclude respondents' resort to another remedy. As this Court's cases make clear, however, the important point is that the tax refund remedy is the "better-fitted" of the remedies, *EC Term of Years*, 127 S. Ct. at 1767, and the one that Congress specifically tailored for claims like those at issue here.

tend the limitations period for the specific one." 127 S. Ct. at 1767. Permitting third parties to proceed under the Tucker Act would have had that impermissible effect, and therefore compelled the conclusion that the specifically tailored remedy was exclusive: "We simply cannot reconcile the 9-month limitations period for a wrongful levy claim under § 7426(a)(1) with the notion that the same challenge would be open under § 1346(a)(1) for up to four years." *Id.* at 1768. That reasoning forecloses the result reached by the court of appeals here, because the three-year limitation period for an administrative tax refund claim under 26 U.S.C. 6511(a) simply cannot be reconciled "with the notion that the same challenge would be open under [Section 1491(a)] for up to [six] years." *EC Term of Years*, 127 S. Ct. at 1768.

As respondents' successful claims for the 1997 through 1999 tax years demonstrate, App., *infra*, 4a, respondents could have asserted their Export Clause claims through the specific remedial scheme for tax refunds, if they had timely complied with the requirements of that statutory scheme. See *Cyprus Amax Coal Co.* v. *United States*, 205 F.3d 1369, 1372 (Fed. Cir. 2000), cert. denied, 532 U.S. 1065 (2001) (recognizing that a taxpayer who "complied with the tax refund statute and filed a tax refund action * * * can pursue the theories underlying its constitutionally-based causes of action through its tax refund action"). Like the trust in *EC Term of Years*, respondents should not be allowed to relabel their claims and thereby "effortlessly evade" the restrictions that Congress placed on the remedy specifically tailored for those claims. 127 S. Ct. at 1767-1768. As this Court has observed, "[i]t would require the suspension of disbelief to ascribe to Congress the design to

allow its careful and thorough remedial scheme to be circumvented by artful pleading." *Brown*, 425 U.S. at 833.

The decision below also conflicts with *Hinck* in another respect, because the court of appeals allowed respondents selectively to rely on a benefit of Congress's comprehensive remedial scheme—the allowance of interest—without complying with the restrictions on that same remedial scheme. Just as this Court refused to allow the taxpayers in *Hinck* "to isolate one feature of th[e] 'precisely drawn, detailed statute,'" respondents should not be permitted to "disaggregat[e]" a remedial scheme that "Congress plainly envisioned as a package deal." 127 S. Ct. at 2016.

C. The Court Of Appeals' Decision Also Conflicts With This Court's Precedents In Other Respects

The court of appeals permitted respondents to recover a refund of their excise taxes, and associated interest, through an action for "money damages" in the Court of Federal Claims directly under the Export Clause and the Tucker Act, as an "alternative avenue[]" to "a tax refund action" that is "not subject to compliance with the tax refund statute." *Cyprus Amax*, 205 F.3d at 1373, 1375-1376; see App., *infra*, 2a-3a. That decision cannot be squared with this Court's longstanding precedent.

1. As an initial matter, the court of appeals erred in concluding that the Export Clause, "affords an independent cause of action for monetary remedies." *Cyprus Amax*, 205 F.3d at 1373. Nothing about the prohibitory language of the Export Clause suggests that the

provision is "self-executing," *id.* at 1374, or that it "provides for money damages." *Id.* at 1376.[5]

In addition, the court of appeals' reliance on the Export Clause does not excuse its failure to give effect to the principle that a precisely drawn, detailed statute preempts more general remedies, because this Court has made clear that the same approach is applicable even when (as here) constitutional claims are at issue. In *Bush* v. *Lucas*, 462 U.S. 367 (1983), the Court declined to recognize an implied judicial remedy directly under the Constitution for federal employees whose First Amendment rights were violated by their supervisors, because Congress had created a comprehensive civil-service system through which federal employees could challenge adverse personnel actions. *Id.* at 385-390. Although it assumed that the civil-service remedies were "not as effective as an individual damages remedy"

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[5] The language of the Export Clause ("No Tax or Duty shall be laid") is merely prohibitive, in stark contrast to the remedial language included in the Just Compensation Clause of the Fifth Amendment ("nor shall private property be taken for public use, without just compensation"). See *United States* v. *Testan*, 424 U.S. 392, 401 (1976) (rejecting analogy to the Just Compensation Clause in holding that two federal statutes did not create a claim for money damages). The Export Clause thus cannot "fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Id.* at 400 (quoting *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)). Moreover, even if a cause of action could be inferred from the Export Clause in the absence of any statutory remedy for a violation of the Clause, Congress has provided a substantial remedy in the tax refund statute, as respondents' successful efforts to recover for the 1997 through 1999 tax years attest. Unlike the plaintiffs in *Bivens* for whom it was "damages or nothing," *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring in judgment), here respondents seek a remedy above and beyond that expressly provided by Congress.

under the Constitution, *id.* at 372, the Court framed the relevant question as "whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue." *Id.* at 388. The Court answered that question in the negative, stating that "we decline 'to create a new substantive legal liability without legislative aid and as at common law,' because we are convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it." *Id.* at 390 (citation omitted).

2. In any event, even if the Export Clause could be construed to give rise to an implicit independent right of action, precedent of this Court would compel the conclusion that the specific limitations and procedural requirements established by Congress to govern tax refund claims are fully applicable to such claims. Under the plain language of 26 U.S.C. 7422(a) it is the remedy sought—not the source of the litigant's cause of action—that governs whether the statutory prerequisites apply. "*No* suit" for the recovery of "*any* internal revenue tax alleged to have been erroneously or illegally assessed or collected" can be maintained in "*any*" court unless the statute's administrative claim requirements are satisfied. *Ibid.* (emphases added). And, as the prayer for relief in respondents' complaint demonstrates, App., *infra*, 37a-38a (seeking "an award of damages consisting of a refund"), their suit is inherently and necessarily an action to recover illegally collected taxes, not a suit for general damages. Indeed, the court of appeals characterized respondents' relief as a "repayment" or "recovery" of their taxes. *Id.* at 1a-2a. Accordingly,

even assuming the Export Clause is "self-executing," refund actions based on the Export Clause would not be exempt from the restrictions created by Congress to govern all tax refund claims. Cf. *Alexander* v. *"Americans United," Inc.*, 416 U.S. 752, 759 (1974) (observing that decisions of this Court make "unmistakably clear that the constitutional nature of a taxpayer's claim * * * is of no consequence" for purposes of applying the Anti-Injunction Act, 26 U.S.C. 7421, which bars suits to enjoin assessment or collection of a tax).

Indeed, in *New York & Cuba Mail*, this Court rejected a taxpayer's attempt, in a case involving an Export Clause claim, to evade one of the prerequisites for a tax refund suit. There, the taxpayer sought to invoke the jurisdictional provisions of the Tucker Act by relying on a provision of a statute authorizing the government to refund any taxes "in any manner wrongfully collected." See 200 U.S. at 494-495 (quoting Act of May 12, 1900, ch. 393, § 1, 31 Stat. 178). The Court held that the taxpayer could not thereby circumvent the then-applicable requirement that a tax be paid under protest, because that requirement "was clearly demanded for the protection of the Government * * * and without it there would not be the slightest vestige of involuntary payment." *Id.* at 495.[6]

Similarly, precedent of this Court compels rejection of the Federal Circuit's conclusion that, because "the statute of limitations is six years for a cause of action

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[6] The Federal Circuit attempted to distinguish *New York & Cuba Mail* on the ground that the taxpayer there proceeded under a tax refund statute, rather than under the Export Clause. *Cyprus Amax*, 205 F.3d at 1375-1376. If the Federal Circuit's decisions here and in *Cyprus Amax* are correct, however, the taxpayer in *New York & Cuba Mail* likewise should have been entitled to recover.

under the Tucker Act," an independent claim brought directly under the Export Clause would have a six-year limitation period. *Cyprus Amax*, 205 F.3d at 1372 (citing 28 U.S.C. 2501); *ibid.* (stating that "a different statute of limitations pertains to the Tucker Act than to the tax refund statutes"); see App., *infra*, 2a-3a. The Federal Circuit expressly declined to apply the shorter limitation period designed specifically for tax refund actions. Compare 28 U.S.C. 2501 ("[e]very claim" must be filed "*within* six years after the claim first accrues") (emphasis added), with 26 U.S.C. 6511(a) and 6532(a)(1) (mandating shorter limitation periods for tax refund claims).

That holding is squarely inconsistent with this Court's decision in *United States* v. *A.S. Kreider Co.*, 313 U.S. 443, 447 (1941), which held that the Tucker Act's general six-year limitation period establishes only "an outside limit on the period within which all suits might be initiated" against the United States. The *A.S. Kreider* Court rejected a similar attempt by a taxpayer to avoid the then-applicable statute of limitations specific to tax refund actions. See 313 U.S. at 446. Having failed (like respondents here) to file a timely tax refund action in compliance with that tax-specific provision, the taxpayer (again like respondents) sought to rely upon the longer, six-year statute of limitations in the Tucker Act, which applied generally to "suit[s] against the Government," including but not limited to suits "for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected." 28 U.S.C. 41(20) (1940). The Court rejected that attempt, reasoning that the shorter and more specific limitation period for tax-refund actions would have "no meaning" if it could be evaded through reliance on the general

Tucker Act limitation period. 313 U.S. at 448. Observing that the six-year limitation was phrased merely as an "outside limit" (*i.e.*, providing that "[n]o suit * * * shall be allowed * * * unless" brought within six years of accrual), the Court held that "nothing in that language precludes the application of a different and shorter period of limitation to an individual class of actions." *Id.* at 447 (quoting 28 U.S.C. 41(20) (1940)). In so holding, the Court noted the strong federal policy behind the shorter limitation period: Congress "[r]ecogniz[ed] that suits against the United States for the recovery of taxes impeded effective administration of the revenue laws." *Ibid.*

The current version of the six-year limitation period is likewise phrased as an "outside limit," mandating that "[e]very claim * * * shall be barred unless" filed within six years. 28 U.S.C. 2501. *A.S. Kreider* therefore forecloses the court of appeals' holding that respondents are subject only to the general six-year limitation and not the shorter and more specific regime applicable to tax refund claims.

In fact, the general Tucker Act jurisdictional provision, Section 1491(a)—on which *Cyprus Amax* grounded jurisdiction in the Court of Federal Claims, 205 F.3d at 1373, and from which it inferred the applicability of the Tucker Act's general six-year limitation period, *id.* at 1372—is also the provision that confers jurisdiction in the Court of Federal Claims over tax refund suits in which the entitlement to a refund rests solely on the Internal Revenue Code rather than the Constitution. See 28 U.S.C. 1491(a); see pp. 11-12, *supra*. It is undisputed, however, that in such cases the taxpayers may not rely on the six-year limitation period for Tucker Act claims generally, but are instead subject to the

more specific and less generous provisions of 26 U.S.C. 6511(a), 6532(a)(1), and 7422(a). There is thus no support for the Federal Circuit's refusal to apply in this case the "emphatic" and "highly detailed technical" limitation periods established by Congress for the recovery of taxes. *Brockamp*, 519 U.S. at 350.

3. The court of appeals likewise erred in allowing respondents to evade the restrictions on tax refund actions while benefitting from Congress's decision to allow interest on amounts awarded in such actions. Section 2411 allows an award of interest only in a judgment "for any overpayment in respect of any internal-revenue tax" through "the date of the refund check" issued by the IRS. By its terms, therefore, Section 2411 does not authorize an award of interest in a judgment for non-refund "money damages." But without revisiting the jurisdictional basis upon which its ability to hear the case turn[ed]" (see *Cyprus Amax*, 205 F.3d at 1373), the court of appeals here effectively repudiated any suggestion that the case was for "money damages" (as purportedly distinct from a tax refund). Instead, the court held that interest could be awarded because respondents were entitled to judgment for the "repayment of the export taxes," for "recovery of the illegally levied taxes," and for "recovery of payment of the unconstitutional export tax" (App, *infra*, 1a, 2a), establishing beyond cavil that the court understood the inherent nature of the tax refund it was granting to respondents. See also *id.* at 37a-38a (complaint seeking "damages consisting of a refund").

Furthermore, the court of appeals erred in relying on "general damages principles," App., *infra*, 1a, and the notion that "the government should pay for its use of a taxpayer's money," *id.* at 5a, as a basis for awarding

interest against the government. As this Court has made clear, such principles do not govern awards of interest against the United States, because "interest cannot be recovered in a suit against the Government in the absence of an express waiver of sovereign immunity from an award of interest." *Library of Cong.* v. *Shaw*, 478 U.S. 310, 311 (1986); see *id.* at 317-318; 28 U.S.C. 2516(a) ("Interest on a claim against the United States shall be allowed in a judgment of the United States Court of Federal Claims only under a contract or Act of Congress expressly providing for payment thereof.").

Thus, the Federal Circuit's decision to award interest is wholly irreconcilable with its decision to allow respondents to bring this action without complying with the prerequisites of the tax refund remedial scheme, and it exceeds the scope of Congress's waiver of sovereign immunity for interest on refund claims. The court of appeals effectively "disaggregat[ed]" a statutory remedial scheme that "Congress plainly envisioned as a package deal." *Hinck*, 127 S. Ct. at 2016. Respondents cannot have it both ways: this suit cannot be one for "money damages" that is purportedly beyond the reach of the restrictions on tax refund suits in 26 U.S.C. 6511(a), 6532(a)(1), and 7422(a), but at the same time be a suit for the recovery of an "overpayment" of tax on which interest is due under 28 U.S.C. 2411.

4. More broadly, the court of appeals' decision ignores this Court's precedents establishing the principles that must guide courts when construing statutes that involve a waiver of sovereign immunity. Under those precedents, any doubt about whether a remedial scheme precludes resort to other remedies must be resolved in favor of the government. It is axiomatic that the United States cannot be sued unless Congress has waived the

government's sovereign immunity, and such waivers are strictly construed. See, *e.g.*, *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 33, 34, 37 (1992); *Dalm*, 494 U.S. at 608. Terms and conditions that Congress attaches to the legislative waiver of sovereign immunity must therefore be strictly construed. *Block* v. *North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983). "A statute of limitations requiring that a suit against the government be brought within a certain time period is one of those terms." *Dalm*, 494 U.S. at 608; see *Block*, 461 U.S. at 287.

Thus, when a party fails to commence a suit against the United States within the limitation period, the government has not waived its sovereign immunity, and the courts lack authority to entertain the suit. *Dalm*, 494 U.S. at 608-610. And even when Congress has provided one statute of limitations for a general class of actions, it nevertheless can "provide less liberally for particular actions which, because of special considerations, require[] different treatment." *A.S. Kreider Co.*, 313 U.S. at 447. Congress has done precisely that with respect to tax refund suits. *Ibid.*; see 26 U.S.C. 6511(a), 6532(a)(1). To allow taxpayers like respondents to avoid the restrictions on Congress's waiver of the United States' sovereign immunity for tax refund claims by seeking a refund directly under the Export Clause would improperly permit Congress's "careful and thorough remedial scheme to be circumvented by artful pleading." *Brown*, 425 U.S. at 833.

II. THE QUESTION PRESENTED IS IMPORTANT AND WARRANTS THIS COURT'S REVIEW

The decision of the court of appeals will affect the administration of the tax laws throughout the United

States, and the potential ramifications are not limited to the Export Clause. Because the Court of Federal Claims is a court of national jurisdiction, any similarly situated taxpayer who fails to satisfy the prerequisites of the tax refund remedy can, through artful pleading, avail himself of the more generous terms of the remedy recognized by the Federal Circuit. Moreover, any tax alleged to violate a provision of the Constitution would be a potential candidate for an independent action under the Federal Circuit's rationale. See, *e.g.*, U.S. Const. Art. I, § 8, Cl. 1 and § 9, Cl. 4 (Direct Tax and Uniformity Clauses, both of which are framed in mandatory terms similar to the Export Clause). The large loophole that the Federal Circuit has created in the comprehensive tax remedial scheme crafted by Congress should not be allowed to remain open.

The question presented is one of significant financial and practical consequence to the United States. As of the filing of this petition, there are more than 25 other cases (many with multiple plaintiffs) seeking the recovery of coal excise taxes and related interest for which timely claims for refund were not filed that are pending in the Federal Circuit and the Court of Federal Claims.[7] In similar circumstances, this Court has recognized the need for this Court's review. See, *e.g.*, *United States* v.

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[7] The government notes that bills are currently pending in committees in Congress that, if passed, could resolve the question presented with respect to the coal excise tax in particular. See S. 373, 110th Cong., 1st Sess. (2007); H.R. 1762, 110th Cong., 1st Sess. (2007). This Court's review is nonetheless warranted. Similar bills were introduced in the previous Congress but were not enacted, and there is no evident reason to expect a different result now. See S. 2884, 109th Cong., 2d Sess. (2006); H.R. 5097, 109th Cong., 2d Sess. (2006); H.R. 3771, 109th Cong., 2d Sess. (2006).

Hill, 506 U.S. 546, 549 (1993); *United States* v. *Goodyear Tire & Rubber Co.*, 493 U.S. 132, 138 (1989); *United States* v. *American Bar Endowment*, 477 U.S. 105, 109 (1986). Such review is warranted here.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further consideration in light of *EC Term of Years Trust* v. *United States*, 127 S. Ct. 1763 (2007), and *Hinck* v. *United States*, 127 S. Ct. 2011 (2007). In the alternative, the petition should be granted and the case set for briefing and oral argument.

Respectfully submitted.

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SEPTEMBER 2007

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

04-5155, -5156

CLINTWOOD ELKHORN MINING COMPANY, GATLIFF COAL COMPANY, AND PREMIER ELKHORN COAL COMPANY, PLAINTIFFS-APPELLANTS

v.

UNITED STATES, DEFENDANT-CROSS-APPELLANT

Decided: Jan. 22, 2007

Before: NEWMAN, GAJARSA, and LINN, *Circuit Judges.*

NEWMAN, *Circuit Judge.*

Clintwood Elkhorn Mining Co., Gatliff Coal Co., and Premier Elkhorn Coal Co. (collectively "Clintwood") appeal the decision of the United States Court of Federal Claims[1] denying interest on the repayment of the export taxes they had paid in an unconstitutional levy. In view of statutory provisions of the tax laws as well as general damages principles, we conclude that the Court of Federal Claims erred in holding that no interest was payable on recovery of the illegally levied taxes.

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[1] *Sub nom. Andalex Resources, Inc. v. United States*, No. 00-cv-249 (Fed. Cl. July 21, 2004).

The United States cross appeals, asking this court to reconsider and overturn our decision in *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369 (Fed. Cir. 2000), which recognized the Tucker Act jurisdiction of the Court of Federal Claims for claims directed to recovery of payment of the unconstitutional export tax. We confirm the jurisdiction of the Court of Federal Claims.

BACKGROUND

By statute, 26 U.S.C. § 4121(a)(2), effective 1978, tax was levied, *inter alia*, on exports of coal from United States mines. In *Ranger Fuel Corp. v. United States*, 33 F. Supp. 2d 466 (E.D. Va. 1998) this export tax was held to be unconstitutional. The United States did not appeal the *Ranger Fuel* decision, and the Internal Revenue Service issued a notice of acquiescence in May 2000. Thereafter various coal producers and exporters, including the plaintiffs herein, filed Tucker Act claims requesting damages in the amount of the export tax and interest. Recovery was sought for the prior six years, which is the statutory period of limitations for Tucker Act claims. In the Court of Federal Claims the government challenged recovery beyond three years, and also challenged the claim for interest on the recovered tax payments.

I

In *Cyprus Amax* this court held that compensation for violation of the Export Clause is not limited to the administrative processes of the Internal Revenue Service, and that the taxpayer can sue in the Court of Federal Claims and "recover for payment of taxes under the Export Clause independent of the tax refund statute," *i.e.*, without first filing an administrative refund

claim with the IRS. 205 F.3d at 1374. The government asks for *en banc* reversal of *Cyprus Amax*, and urges that suit cannot be brought under the Tucker Act for refund of taxes levied in violation of the Constitution. This question was fully aired at the time of *Cyprus Amax*, was decided by a unanimous panel, was denied rehearing and rehearing *en banc*, and the government's petition for writ of certiorari was denied. We discern no basis for reopening this question.

The Court of Federal Claims, applying *Cyprus Amax*, held that there was Tucker Act jurisdiction of Clintwood's refund claims. We confirm that jurisdictional ruling.

II

A consequence of Tucker Act jurisdiction is that the statute of limitations is six years, 28 U.S.C. § 2501, whereas refund claims brought administratively to the Internal Revenue Service are limited to recovery of overpayments for the preceding three years. *See* 26 U.S.C. § 6511(a). Clintwood filed Tucker Act claims for the three tax years 1994 through 1996 and administrative claims for the tax years 1997 through 1999. The Court of Federal Claims acknowledged that, in view of *Cyprus Amax*, Clintwood could either proceed in court under the Tucker Act, or seek an administrative tax refund under the Tax Code. *Andalex Resources Inc. v. United States*, 54 Fed. Cl. 563 (2002). Entitlement to recovery of the export taxes paid is not at issue, and the parties have agreed as to the amount of taxes paid during 1994-1999.

However, the Court of Federal Claims held that Clintwood is not entitled to interest on the recovered export taxes for the earliest three of the six years, that is,

for 1994 through 1996. The court held that since Clintwood had not filed an administrative claim for refund for those years, then interest cannot be recovered on the refund for those years. The government does not dispute entitlement to interest for the refund for 1997 through 1999, because an administrative claim was filed for those years.

Interest on overpayment of any internal revenue tax is provided by statute:

> 28 U.S.C. § 2411. In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under section 6621 of the Internal Revenue Code of 1986 upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue.

The Court of Federal Claims concluded that § 2411 does not apply to the three years in which the administrative steps for refund under the Tax Code were not taken. The government argued, and the court agreed, that administrative refund requests under 26 U.S.C. § 6511 cannot be bypassed by judicial action, and that since recovery is limited to the prior three years under § 6511, interest for six years cannot be paid when the refund is obtained under the Tucker Act. *Andalex Resources*, 54 Fed. Cl. at 565 ("Plaintiffs have chosen to pursue their claims independently of the tax refund system, so they

may not use the § 2411 waiver of sovereign immunity for interest payments.") Thus the court denied interest for the three earliest tax years, for Clintwood did not follow the IRS administrative procedure for those years. The court relied on *Economy Plumbing & Heating Co. v. United States*, 470 F.2d 585, 592 (Ct. Cl. 1972), for the statement that 28 U.S.C. § 2411 applies "only to taxpayers who have overpaid their taxes, have filed a timely claim for refund, and are within the administrative system providing for the recovery of overpaid taxes and are entitled to its benefits." However, *Economy Plumbing* was not a tax refund case, and the quoted statement was made only to explain that § 2411 did not apply to a contract dispute where the contractor sought interest on a contract adjustment it had received from the government. *Economy Plumbing* cannot be extended to the present case.

No precedent has been cited or found to the effect that interest is barred on Tucker Act recovery except for the period during which the plaintiff could have obtained interest through an administrative procedure. Such a convoluted threshold is not imposed by § 2411, which is a straightforward recognition that the government should pay for its use of a taxpayer's money to which the government was not entitled.

The legislative history of § 2411 is directly relevant to this conclusion. In 1924 Congress repealed the requirement that a refund claim must be filed as a precondition to receiving interest under the predecessor of 26 U.S.C. § 2411. The House Report explained that

> if the amounts in question were not legally owing to the Government, it is equitable that the Government should pay a reasonable rate of interest during the

> period of their retention; and the fact of protest or a claim does not affect the merits of such an interest payment.

H. Rep. No. 68-179, at 35 (1924). The Report explained that a tax overpayment is not fully remedied unless it includes interest for the time that the money was in the hands of the government. *Id.* There is no basis now to narrow the principle of § 2411 through reimposing this long-dead administrative requirement.

The threshold requirement under § 2411 is a judgment for the overpayment. Section 2411 provides for interest on "any judgment of any court" for "any overpayment in respect to any internal-revenue tax," and the term "overpayment" has been defined by the Supreme Court as including a tax "erroneously or illegally assessed or collected." *Jones v. Liberty Glass Co.*, 332 U.S. 524 (1947). In *Liberty Glass* the Court discussed the term "overpayment" and saw "no basis for making it over into a word of art." 332 U.S. at 532. Neither law nor logic supports the government's position that no interest can be paid under § 2411 except for the period for which interest could be paid under § 6511.

The judgment of the Court of Federal Claims, denying interest on the first three years of Clintwood's Tucker Act recovery, is contrary to law and is reversed. We remand for the award of interest on the refunded export taxes for the entire period of recovery.

REVERSED AND REMANDED

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

No. 00-249 T

CLINTWOOD ELKHORN MINING COMPANY,
GATLIFF COAL COMPANY, AND
PREMIER ELKHORN COAL COMPANY

v.

THE UNITED STATES

[Filed: July 21, 2004]

JUDGMENT

Pursuant to the parties' July 12, 2004 Stipulated Judgment and the court's July 15, 2004 directive authorizing the clerk to enter judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff shall recover of and from defendant, United States, the sum of $1,065,936, as set forth on the attached Exhibit A. No interest. All parties shall bear their own costs, including any possible attorney's fees or other expenses of this litigation.

Brian Bishop
Clerk of Court
By: /s/ ILLEGIBLE
Deputy Clerk

July 21, 2004

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $255.00.

Exhibit A

STIPULATED JUDGMENT AMOUNTS IN
CLINTWOOD ELKHORN MINING CO., ET AL.
v. *UNITED STATES, FED. CL. NO. 00-249T*

	Clintwood Elkhorn Mining Company	Gatliff Coal Company	Premier Elkhorn Coal Company
1Q/94	$ 24,675	$ 4,055	$ 0
2Q/94	100,534	19,463	0
3Q/94	85,914	25,470	0
4Q/94	103,004	21,452	0
1Q/95	68,086	22,909	0
2Q/95	105,214	19,304	6,883
3Q/95	113,813	10,308	27,874
4Q/95	115,815	15,434	14,873
1Q/96	87,037	11,226	13,423
2Q/96	0	23,615	0
3Q/96	0	17,287	0
4Q/96	0	8,268	0
Totals	**$804,092**	**$198,791**	**$63,053**

APPENDIX C

UNITED STATES COURT OF FEDERAL CLAIMS

No. 99-268T; 00-245T; 00-634T; 98-414T; 00-457T; 00-249T; 00-244T; 99-299T; 00-243T; 97-68T; 97-310T; 97-311T; 97-317T; 97-521T; 97-522T; 98-557T; 98-200T; 01-252T; 00-218T; 00-216T; 00-248T; 00-762T; 00-247T; 99-301T; 01-423T; 00-236T; 99-298T; 00-250T; 01-422T; 00-242T; 00-246T; 00-467T; 01-252T; 00-148T; 02-200T

ANDALEX RESOURCES, INC., ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Dec. 20, 2002]

ORDER

Defendant's Protective Motion for Partial Dismissal or for Partial Summary Judgment is DENIED[.] Counsel agree it is not necessary for plaintiffs to file responses to defendant's motion, and we concur.

/s/ ILLEGIBLE
Robert H. Hodges, Jr.
Judge

APPENDIX D

UNITED STATES COURT OF FEDERAL CLAIMS

Nos. 99-268T; 00-241T; 00-245T; 00-634T; 98-414T; 00-634T; 00-457T; 00-249T; 00-244T; 99-299T; 00-243T; 97-68T; 97-310T; 97-311T; 97-317T; 97-521T; 97-522T; 98-557T; 98-200T; 01-252T; 00-218T; 00-216T; 00-248T; 00-762T; 00-247T; 99-301T; 01-423T; 00-236T; 99-298T; 00-250T; 01-422T; 00-242T; 00-246T; 00-467T; 01-252T; 00-148T; 02-200T

ANDALEX RESOURCES, INC. ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

Filed: Nov. 19, 2002

OPINION

HODGES, Judge.

The opinion that follows was issued on July 23, 2002, then withheld because the Federal Circuit's opinion in *United States Shoe Corporation*, was distributed the same day. *See United States Shoe Corp. v. United States*, 296 F.3d 1378 (Fed. Cir. 2002). We issued an Order on July 25 advising the parties of the opinion granting defendant's motion for summary judgment, and

asked how they wished to proceed in light of the *U.S. Shoe* decision[1].

We held a hearing on August 29 to discuss the effect of the Federal Circuit's opinion on this case, and the parties briefed the issue further in September. We have considered the parties' arguments, and submit the opinion herewith as it was drafted.

INTRODUCTION

Plaintiff coal producers paid federal taxes on their shipments of coal pursuant to 26 U.S.C. § 4121. Some of the shipments included exports. A federal district court held that the coal tax was unconstitutional when applied to exports. *Ranger Fuel Corp. v. United States*, 33 F. Supp. 2d 466 (E.D. Va. 1998). The Government did not appeal this holding. The Internal Revenue Service issued a notice of acquiescence to the *Ranger Fuel* ruling in May 2000. *See* Notice 2000-28, 2000-21 LR. B. 1116 (May 22, 2000). Plaintiffs subsequently brought claims for refunds in this court under the Tucker Act and filed motions for summary judgment on the issue of interest on those claims. *See Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 1065 (2001).

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[1] "While the export clause provides plaintiffs with an alternate and independent avenue for tax overpayment recovery, the provision is not interest-mandating. Because the export clause does not contain a constitutional waiver of sovereign immunity, plaintiffs cannot recover interest under that provision. On that basis, we would grant defendant's cross-motion for summary judgment." *Andalex Resources, Inc., et al. v. United States*, No. 99-268T (Fed. Cl. July 25, 2002).

The Government filed a cross-motion for partial summary judgment on the interest issue. We grant defendant's cross-motion for partial summary judgment.

BACKGROUND

The Federal Circuit reversed this court's holding that the Court of Federal Claims lacked jurisdiction to entertain plaintiffs' constitutionally-based tax claims because they had not observed administrative tax refund requirements. *See Cyprus Amax*, 205 F.3d at 1371. The Circuit explained that plaintiffs met the jurisdictional requirements of this court because "the Export Clause is self-executing." *Id.* at 1374. Therefore, "a party can recover for payment of taxes under the Export Clause independent of the tax refund statute." *Id.*

The appeals court explained that plaintiffs "had two alternate avenues through which to obtain relief—a tax refund action or a cause of action based on the Export Clause—and either one is sufficient to invoke the Court of Federal Claims' jurisdiction under the Tucker Act." *Id.* at 1375. The Export Clause provides plaintiffs with an alternate means to recover their tax overpayments under the Tucker Act. The Circuit's *Cyprus Amax* decision permits plaintiffs to use the Tucker Act's six-year statute of limitations without complying with the administrative tax refund requirements. *Id.* at 1372. Plaintiffs "can potentially recover an additional three years of taxes under the Tucker Act than under a tax refund claim." *Id.* at 1372-73. Now plaintiffs seek awards of interest added to any judgments of tax overpayment that this court may allow.

DISCUSSION

Plaintiffs employ the alternate avenue of relief supplied by the Export Clause of the Constitution and by the ruling of the Federal Circuit in *Cyprus Amax*. By choosing this avenue, they can recover six years of tax overpayments instead of the three years that would have been permitted according to the administrative process of the tax code. Their claims for interest are predicated both upon the statutory provisions of 28 U.S.C. § 2411 and upon the Export Clause of the Constitution.

28 U.S.C. § 2411 Claims

"[T]he United States upon claims made against it, cannot, in the absence of a statute to that end, be subjected to the payment of interest." *United States v. Rogers*, 255 U.S. 163, 169 (1921) (citations omitted). According to plaintiffs, Congress provided the necessary waiver of sovereign immunity for us to award them interest, in 28 U.S.C. § 2411. Section 2411 of Title 28, United States Code, provides a pertinent part:

> In any judgment of any court rendered (. . . against the United States . . .) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under section 6621 of the Internal Revenue Code of 1986 upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue.

28 U.S.C. § 2411. Plaintiffs assert that this court must award interest on their claims because they will receive:

1) a judgment rendered against the United States; 2) for an overpayment; 3) in respect of an internal revenue tax.

The Government contends that plaintiffs' choice to pursue their claims under the Export Clause of the Constitution precludes their claims for pre-judgment interest under § 2411. Congress enacted § 2411 to aid in judicial enforcement to tax refunds; it is essentially a tax refund statute. Plaintiffs have chosen to pursue their claims independently of the tax refund system, so they may not use the § 2411 waiver of sovereign immunity for interest payments.

28 U.S.C. § 2411 Waiver of Immunity

The Tucker Act gives this court jurisdiction to hear tax refund actions. "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon . . . any Act of Congress . . ." 28 U.S.C. § 1491. The Tucker Act includes a six-year statute of limitations. *See* 28 U.S.C. § 2501. The Tucker Act is a jurisdictional statute and its statute of limitations is general.[2] As a result, tax refund claims brought in the Court of Federal Claims under the Tucker Act generally retain the shorter limitations provided by the Internal Reven-

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[2] The Court of Federal Claims explained this in *West Publ'g Co. Employees' Preferred Stock Ass'n v. United States*, 198 Ct. Cl. 668, 674 n.6 (1972) (quoting *United States v. A.S. Kreider Co.*, 313 U.S. 443, 447 (1941)):

> [T]here has been no question but that the general six-year statute was intended only as an outside limit on the period within which all suits against the United States might be begun, and that "Congress left it open to provide less liberally for particular actions which, because of special considerations, required different treatment."

ue Code, 26 U.S.C. § 6511 (2002).[3] The IRC limitations apply in situations like plaintiffs' where a statute is declared unconstitutional after the parties have paid taxes:

> The statute of limitation on the right to a refund or to recover any amount assessed and collected as a tax cannot be made to depend upon the question of whether there was any legal authority for the assessment and collection. [Otherwise] the statute of limitation would be practically of no force or effect. The statute of limitation is jurisdictional in this court, and when . . . the time within which a person may bring a suit against the United States has expired, or that plaintiff has not complied with the requirements necessary to give him a right to maintain a suit, this court is without jurisdiction to entertain it.

West Publ'g Co. Employees' Preferred Stock Ass'n v. United States, 198 Ct. Cl. 668, 674-75 (1972) (quoting *Wisconsin National Life Ins. Co. v. United States*, 70 Ct. Cl. 433, 438 (1930)).

Tax refund claims brought under Tucker Act jurisdiction are further restricted by administrative requirements. "[A]n administrative claim must be filed before a suit seeking a refund may be brought *in any court*." *Williams v. United States*, 11 Cl. Ct. 189, 191

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[3] 26 U.S.C. § 6511(a) provides in pertinent part:

> Period of limitation on filing claim. Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid . . [.]

(1986), *aff'd* 818 F.2d 877 (Fed. Cir. 1987) (citing 26 U.S.C. § 7422(a)) (emphasis added). As a result, "[f]ailure to plead and demonstrate that a timely administrative claim has been filed . . . wrests jurisdiction from this court." *Id.* at 191-92.

Plaintiffs must file timely refund claims with the IRS, followed by complaints submitted to this court demonstrating their adherence to administrative requirements, to receive judgments under the Tucker Act. If the court renders judgment in their favor, and the refund is based upon a tax overpayment, 28 U.S.C. § 2411 provides interest on the judgment. Plaintiffs would avoid the shorter statute of limitations, and the administrative requirements of the tax refund statutes by using the Export Clause for jurisdiction, while returning to the tax statutes to obtain interest pursuant to § 2411.

28 U.S.C. § 2411 Interest

Plaintiffs are not seeking tax refunds, yet they claim that 28 U.S.C. § 2411 authorizes awards of interest on their claims. They contend that § 2411 provides interest on any judgment for restitution of tax overpayments, regardless of whether the claimant adhered to administrative tax refund requirements.

Plaintiffs chose to pursue their claims for damage under the Export Clause rather than as tax refunds pursuant to the Tax Code. "Because their claims are not for tax or penalty refunds, their claims do not fall within the jurisdiction of the Court of Federal Claims pursuant to 28 U.S.C. § [] . . . 1491, the statute[] that give[s] the Court of Federal Claims jurisdiction over claims for tax refunds." *Brown v. United States*, 105 F.3d 621, 623

(1997).[4] As the Federal Circuit explained, plaintiffs have removed themselves from the tax refund system and this court's jurisdiction over tax refund claims. *Id.* Plaintiffs' claims here fall within the jurisdiction of this court only because the Export Clause provides them with an independent cause of action for a monetary remedy. *Cyprus Amax*, 205 F.3d at 1374.

Title 28 U.S.C. § 2411 permits claimants to receive pre-judgment interest in tax refund cases. It provides an express waiver of sovereign immunity for such claims against the Government. *See Library of Congress v. Shaw*, 478 U.S. 310, 318 n.6 (1986). Claimants must be within the tax refund system to receive interest pursuant to § 2411, however. The Court of Claims so ruled in *Economy Plumbing & Heating Co. v. United States*, 470 F.2d 585 (1972). The court explained:

> We do not think that the provisions of 28 U.S.C. § 2411[] and Section 6611 of the Internal Revenue Code providing for interest . . . upon "any overpayment in respect of any internal-revenue tax" . . . has any application to this case. We interpret those statutes as applying only to taxpayers who have overpaid their taxes, have filed a timely claim for refund, *and are within the administrative system providing for the recovery of overpaid taxes and are entitled to its benefits.*

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[4] In *Brown*, the Federal Circuit declared that plaintiff taxpayers' claims for monetary damages based upon fraudulent takings and Fourth Amendment violations lacked subject matter jurisdiction in the Court of Federal Claims under the Tucker Act's tax refund jurisdiction. *See Brown v. United States*, 105 F.3d 621 (1997).

Id. at 591-92 (emphasis added).[5] Plaintiffs in this case are taxpayers who overpaid their taxes and they filed claims for refunds. However, they brought this action under the Export Clause, and are not entitled to the benefits of the tax refund system.

Tax refund statutes apply to tax refund actions. Plaintiffs may not use § 2411 to recover interest on any judgment that this court may render regarding plaintiffs' principal claims. We may award interest only if the Export Clause mandates interest.

Export Clause Claims

Plaintiffs claim that constitutional provisions carrying a requirement for monetary awards inherently provide for interest awards. In effect, any money-mandating Constitutional provision implies a similar Constitutional mandate for interest. We agree with the Government that this court may award pre-judgment interest on plaintiffs' Constitutionally-based claims only if the Export Clause mandates such an award.

Plaintiffs argue that money-mandating constitutional provisions implicitly are interest-mandating provisions. *See Library of Congress v. Shaw*, 478 U.S. 310, 317 (1986). They contend that this argument that the Constitution requires payment of interest is supported by court rulings under the Fifth Amendment Takings Clause and the Judicial Compensation Clause of Article III.

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[5] In *Economy Plumbing*, the Court of Claims considered whether plaintiffs, who originally brought suit under a contract claim, could use 28 U.S.C. § 2411(a) to recover interest. *See Economy Plumbing*, 470 F.2d 585 (1972).

Fifth Amendment Takings Clause

"[T]he United States is not liable to interest except where it assumes the liability by contract or by the express words of a statute, or must pay it as part of the just compensation required by the Constitution." *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 47 (1928) (citing *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304, 306 (1923)). The Court later noted that "[t]he allowance of interest in eminent domain cases is only an apparent exception [to the "no-interest" rule], which has its origin in the Constitution." *Smyth v. United States*, 302 U.S. 329, 353 (1937) (citing *Shoshone Tribe of Indians v. United States*, 299 U.S. 476, 497 (1937)). "The requirement that 'just compensation' shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is part of such compensation." *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 306 (1923).

Plaintiffs argue that the Fifth Amendment's requirement that interest be paid arises not from the Constitution's mandate for payment of "just compensation," but from the constitutional roots of the Fifth Amendment itself. They offer *Hatter v. United States*, 38 Fed. Cl. 166 (1997), which involves Article III of the Constitution, as support for this argument. *See Hatter v. United States*, 38 Fed. Cl. 166 (1997).

Article III Judicial Compensation Clause

The Federal Circuit ruled that Article III of the Constitution is money-mandating, as it relates to judicial compensation. *Hatter v. United States*, 953 F.2d 626, 628 (Fed. Cir. 1992). Article III "mandates the payment

of money in the event of . . ." its violation. *Id.* at 628. The court reasoned that the provision declares "in mandatory and unconditional terms, that judges' salaries 'shall not be diminished during their Continuance in Office.'" *Id.* The compulsory language of the Article and its implied mandate for repayment "presupposes damages as the remedy for a governmental act violating the [provision]." *Id.*

The Court of Federal Claims ruled that Article III is interest-mandating. *See Hatter v. United States*, 38 Fed. Cl. 166 (1997).[6] The court derived this affirmative requirement from the language of Article III "specifically requir[ing] that judicial compensation be paid 'at stated Times.'" *Id.* at 183 (citations omitted). The cardinal objective of the provision "is to maintain the independence of the federal judiciary." *Id.* The court reasoned that a failure to award interest for violations of the Judicial Compensation Clause would threaten this independence because "Congress would then be free to delay indefinitely payment of the principal amount of protected compensation leaving the judges with no remedy for delay." *Id.*

Plaintiffs maintain that the trial court's view of Article III as an interest-mandating provision follows logically from the Federal Circuit's holding that Article III "mandates the payment of money in the event of a prohibited compensation diminution." *Hatter*, 953 F.2d

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[6] The Federal Circuit considered issues arising from the *Hatter* litigation five times, but that court has not ruled on whether interest is available under the Judicial Compensation Clause. We do not agree with plaintiffs' suggestion that the Federal Circuit accepted the Court of Federal Claims' award of interest in *Hatter v. United States*, 38 Fed. Cl. 166 (1997); the decision was not appealed.

at 628. Plaintiffs contend that the necessary implication of the *Hatter* decisions is that any Constitutional provision providing a cause of action for money damages provides also a cause of action for pre-judgment interest. This argument does not resolve the issue of defendant's sovereign immunity to interest liability.

Plaintiffs point out that the Export Clause and Article III employ wholly prohibitive language, and both are money-mandating. Because the Compensation Clause is interest-mandating, the Export Clause must be as well, they contend.

The Export Clause and Article III employ similar prohibitive language. The Federal Circuit stated that, "[b]oth clauses speak in absolute and unconditional terms, and both protect pecuniary interests." *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369, 1375 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 1065 (2001). The Export Clause, like the Judicial Compensation Clause, is money-mandating. *Cyprus Amax*, 205 F.3d at 1373.[7] Both arise under the Constitution. Such similarities do not compel this court to hold that the Export Clause is also interest-mandating, however.

Prohibition Does Not Equate To Interest-Mandating

The Export Clause and Article III use prohibitive language, but an affirmative requirement of restorative compensation is present only in the Compensation Clause. The Court of Federal Claims grounded its

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[7] The Federal Circuit determined that, "given a fair textual interpretation, the language of the Export Clause leads to the ineluctable conclusion that the clause provides a cause of action with a monetary remedy." *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369, 1373 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 1065 (2001).

award of pre-judgment interest for violations of Article III upon this affirmative requirement. *See Hatter v. United States*, 38 Fed. Cl. 166 (1997). The court reasoned that the affirmative requirement derives from the language of Article III requiring payment of judicial compensation at specific times and that the compensation paid may not be diminished. *Id* at 182-83. "There is a sounder basis for interest on delayed compensation protected under Article III than on just compensation guaranteed by the Fifth Amendment." *Id.* The court predicated this resolution upon Article III's requirement of payment "at stated Times" and upon the Clause's purpose of preserving the autonomy of the federal judiciary. *Id.* The Export Clause lacks such an affirmative requirement or implied right to pre-judgement interest.

The Export Clause contains a proscription against certain government actions. The Supreme Court stated that the "text of the Export Clause . . . expressly prohibits Congress from laying any tax or duty on exports." *United States v. Int'l Bus. Machs[.] Corp.*, 517 U.S. 843, 852 (1996). The language of the Export Clause establishes the provision as a bare prohibition against taxation. It lacks the affirmative requirement for an award of pre-judgment interest discerned in the judicial Compensation Clause. The Court of International Trade arrived at the same conclusion. *See Swisher Intern., Inc. v. United States*, 178 F. Supp. 2d 1354 (Ct. Int'l. Trade 2001).[8]

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[8] Plaintiffs in *Swisher* appealed the Court of International Trade's holding soon after the court released its slip opinion. One of the issues currently on appeal before the Federal Circuit is the denial of plaintiffs' claim for an award of pre-judgement interest under the Export Clause.

> The Export Clause merely contains a prohibition against government action . . . [I]t is not an absolute and affirmative requirement to restore Plaintiffs to their prior position. It is this affirmative requirement that fully waives sovereign immunity under the [Takings] Clause of the Fifth Amendment and perhaps under Article III.

Swisher, 178 F. Supp. 2d at 1362.

"The framers of the constitution employed words in their natural sense; and where they are plain and clear, resort to collateral aids to interpretation is unnecessary, and cannot be indulged in to narrow or enlarge the text . . . " *McPherson v. Blacker*, 146 U.S. 1, 27 (1892). The Export Clause is unambiguous. The prohibition against governmental action does not imply a requirement for an award of interest.

The Export Clause lacks any form of directive that parallels Article III's requirement for compensation payment "at stated Times". The Court of Federal Claims expressed the importance of this timing requirement in its holding that Article III provides pre-judgment interest. *See Hatter v. United States*, 38 Fed. Cl. 166 (1997).

The court reasoned that the underlying purpose of the Judicial Compensation Clause "is to maintain the independence of the federal judiciary" by providing a remedy for its violation. *Hatter*, 38 Fed. Cl. at 183. The purpose of the Export Clause is "the requirement . . . that exports should be free from any governmental burden." *See e.g., United States v. Hvoself*, 237 U.S. 1,

15 (1915) (*quoting Fairbank v. United States*, 181 U.S. 282, 290 (1901).[9]

The Export Clause does not require a self-contained and all-encompassing remedy to further its purpose. The Internal Revenue Code provides full compensatory remedies for violations of the Export Clause. Claimants may take advantage of these remedies so long as they follow the administrative requirements discussed previously in the § 2411 analysis. The holding in *Cyprus Amax* provides plaintiffs with an alternate and independent avenue of relief under the Export Clause to recover their tax overpayments. *Cyprus Amax*, 205 F.3d at 1375. A finding that the Export Clause is interest-mandating would not further the underlying purpose of the provision. Such a holding would neither prevent the imposition of tax burdens upon exports, nor provide claimants with a unique remedy for violations of the clause. The *Hatter* rationale for finding that Article III is interest -mandating does not apply to the Export Clause. *See Hatter v. United States*, 38 Fed. Cl. 166 (1997).

Money-Mandate Does Not Mean Interest-Mandate

Plaintiffs next rely upon statements made by the Federal Circuit that the Export Clause is money-mandating. *Cyprus Amax*, 205 F.3d at 1373. They argue

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[9] Plaintiffs suggest that an award of interest would further the purpose of the Export Clause because "exports should not be made a source of revenue to the national government." *Fairbank v. United States*, 181 U.S. 282, 292-93 (1901). However, the *Fairbank* court stated that this is only part of the Export Clause's purpose. *Id.* It is not equivalent to the primary, underlying purpose of Article III that was given so much weight by the *Hatter* court. *See Hatter v. United States*, 38 Fed. Cl. 166 (1997).

that money-mandating constitutional provisions require money damages, which include compensation. Compensation is the basis for interest awards under the Constitution. As the Export Clause arises under the Constitution, it requires an award of pre-judgment interest.

The *Cyprus Amax* court did not suggest that the Export Clause is interest-mandating. *See Cyprus Amax*, 205 F.3d 1369 (Fed. Cir. 2000). The court did not address the issue of interest at all. The only issue considered by the Federal Circuit in *Cyprus Amax* for the purposes of this analysis was the Export[] Clause's ability to provide "an independent cause of action for [a] monetary remed[y]." *Id.* at 137. The Circuit concluded that "the Export Clause's restriction on taxing power requires Congress to refund money obtained in contravention of the clause." *Id.* at 1373.

A money-mandating provision is not necessarily an interest-mandating provision. The Supreme Court has observed that "[t]he allowance of interest on damages is not an absolute right." *Boston Sand & Gravel*, 278 U.S. at 41, 49 (quoting *The Scotland*, 118 U.S. 507, 518 (1886)).

The Takings Clause and the Compensation Clause do not confer rights to interest based only upon their money-mandating nature. The unique language found in both Constitutional provisions requires the Government to restore claimants to the relative positions that they would have occupied but for the violations.

> [T]he reasoning on which interest is added to value as a part of "just compensation" . . . is not applicable to this situation. That reasoning is that when a court determines just compensation, it first fixes

> bare value at the time of the taking and adds a sum to compensate for deferred payment of bare value so as to make the property owner whole *as required by the Fifth Amendment.*

Albrecht v. United States, 329 U.S. 599, 603 (1947) (emphasis added). "It is the meaning embodied in the term 'just compensation' which creates the requirement that the government provide a 'full and exact equivalent' in the form of interest." *Olson v. United States*, 292 U.S. 246, 254-55 (1934)).

The Constitution requires waiver of sovereign immunity for the recovery of interest against the Government. "In the absence of *constitutional requirements*, interest can be recovered against the United States only if express consent to such a recovery has been given by Congress." *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 658-59 (1947) (emphasis added). The Export Clause lacks such a constitutional requirement.

CONCLUSION

Plaintiffs brought their claims in this court under the Export Clause of the Constitution. They do not assert a tax refund suit under the Tucker Act. Title 28 U.S.C. § 2411 provides a statutory waiver of sovereign immunity to interest liability only for claims brought within the tax refund system. Plaintiffs do not seek a tax refund, so they cannot recover interest under § 2411. While the Export Clause provides plaintiffs with an alternate and independent avenue for recovery, an overpayment of tax in this case, it is not interest-mandating. It does not contain a Constitutional waiver of sovereign immunity, and plaintiffs cannot recover interest under its terms.

Plaintiffs' Cross-Motion for Summary Judgment is DENIED. Defendant's Cross-Motion is GRANTED.

/s/ ILLEGIBLE
Robert H. Hodges, Jr.
Judge

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

04-5155, -5156

CLINTWOOD ELKHORN MINING COMPANY, GATLIFF COAL COMPANY, AND PREMIER ELKHORN COAL COMPANY, PLAINTIFFS-APPELLANT

v.

UNITED STATES, DEFENDANT-CROSS APPELLANT

[Filed: Apr. 27, 2007]

NOTE: This order is nonprecedential.

A petition for rehearing en banc having been filed by the Cross-Appellant, and a response thereto having been invited by the court and filed by the Appellants and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on May 4, 2007.

FOR THE COURT

/s/ ILLEGIBLE
Jan Horbaly
Clerk

Dated: 04/27/07

cc: Steven H. Becker
Steven W. Parks

APPENDIX F

UNITED STATES COURT OF FEDERAL CLAIMS

No. 00-249 T

CLINTWOOD ELKHORN MINING COMPANY, GATLIFF COAL COMPANY, AND PREMIER ELKHORN COMPANY, PLAINTIFFS

v.

UNITED STATES, DEFENDANT

[Filed: Apr. 28, 2000]

COMPLAINT

Plaintiffs, Clintwood Elkhorn Mining Company, Gatliff Coal Company, and Premier Elkhorn Coal Company, by their attorneys, Coudert Brothers, bring this action against defendant, the United States, and for their complaint herein allege, on knowledge as to matters pertaining respectively to themselves, and on information and belief as to all other matters, as follows:

NATURE OF ACTION

1. This is an action seeking damages including recovery of manufacturers' excise taxes imposed and paid in respect of export sales of coal pursuant to 26 U.S.C. § 4121

(hereinafter the "Coal Sales Tax") and seeking a declaratory judgment that the Coal Sales Tax statute is unconstitutional and void *ab initio*.

PARTIES

2. Plaintiffs in this action, Clintwood Elkhorn Mining Company, Gatliff Coal Company, and Premier Elkhorn Coal Company, are listed in the attached Schedule A. They are producers, sellers and exporters of coal and are bringing this action in their respective individual capacities for their respective individual claims to recover Coal Sales Tax assessments paid by each on export sales, either made by them or by corporate affiliates or predecessors who have made such sales and assigned all claims to them. Each Plaintiff has standing in this action because each has paid the Coal Sales Tax in respect to its export sales (or holds valid assignments in respect of such claims) which were illegally assessed and collected in contravention of the U.S. Constitution and the supreme law of the land. No such taxes have been passed on or included in export sales prices paid by any other entity.

JURISDICTION

3. This Court possesses jurisdiction over this action by reason of 28 U.S.C. §§ 1491(a)(1), 2401, and 2501, the Export Clause of the United States Constitution, the Fifth Amendment of the United States Constitution, and the implied contract formed between Plaintiffs and the government for the return of taxes that are void *ab initio*.

FACTUAL ALLEGATIONS

4. Article, I, Section 9, Clause 5 (the "Export Clause") of the United States Constitution provides that "No Tax or Duty shall be laid on Articles exported from any State."

5. In 1978 Congress enacted Pub. L. No. 95-277 § 2(a), 92 Stat. 11 (1978), to impose an excise tax on the sale of coal. The Act, codified in the Internal revenue Code (the "Code") at 26 U.S.C. § 4121, as amended, reads in pertinent part as follows:

§ 4121 Imposition of Tax

(a) Tax Imposed.

(1) In general.—There is hereby *imposed on coal* from mines located in the United States *sold by the producer*, a tax equal to the rate per ton determined under subsection (b).

(2) Limitation on tax.—The amount of the tax imposed by paragraph (1) with respect to a ton of coal shall not exceed the applicable percentage (determined under subsection (b)) of the price at which such ton of coal *is sold* by the producer.

(b) Determination of rates and limitation of tax.—For purposes of subsection (a)

(1) the rate of the tax on coal from underground mines shall be $1.10,

(2) the rate of tax on coal from surface mines shall be $ .55, and

(3) the applicable percentage shall be 4.4 percent.

* * *

(e) **Reduction in the amount of Tax.—**

(1) **In general.—***Effective with respect to sales* after the temporary increase termination date, subsection (b) shall be applied—

(A) by substituting "$.50" for "$1.10",

(B) by substituting "$.25" for "$.55",

(C) by substituting "2 percent" for "4.4 percent".

(2) **Temporary Increase termination date.—**For purposes of paragraph (1), the temporary increase termination date is earlier of—

(A) January 1, 2014, or

(B) the first of January 1 after 1981 as of which there is—

(i) no balance of repayable advances made to the Black Lung Disability Trust Fund, and

(ii) no unpaid interest on such advances.

* * *

26 U.S.C. § 4121 (emphasis added).

6. The bulk of the Coal Sales Tax imposed by the government is collected in respect of domestic sales, and export sales of coal account for less than 10% of total U.S. sales of coal.

7. Although the Code has many excise taxes imposed on sales and generally exempts from such taxes articles sold for export, Code Section 4221(a) provides that export sales of coal subject to the Coal Sales Tax shall *not* be subject to that exception.

8. The Coal Sales Tax paid with respect to export sales is assessed each calendar quarter with respect to sales made during that quarter, and is calculated with reference both to the amount of coal to be exported and the export sales price of such product. As such, the Coal Sales Tax is directly related to the export of merchandise, and imposes a direct tax burden on such exports.

9. Accordingly, to the extent applicable to export sales, the Coal Sales Tax violates the Export Clause and is unconstitutional.

10. Since as early as 1978, Plaintiffs listed in ScheduleA have paid the Coal Sales Tax in excess of $50,000.00 with respect to their exports of coal.

AS AND FOR A FIRST CAUSE OF ACTON

11. Paragraphs 1 through 10 are repeated with the same force and effect as if stated fully herein.

12. The Export Clause of the Constitution (Article I, Section 9, Clause 5) states: "No Tax or Duty shall be laid on Articles exported from any State."

13. The Coal Sales Tax imposed under 26 U.S.C.§ 4121, with respect to export sales, is a tax or duty prohibited by the Export Clause, and is therefore unconstitutional and void *ab initio*.

14. Plaintiffs have paid such taxes on exports which were unconstitutionally imposed, and assessed on export sales.

AS AND FOR A SECOND CAUSE OF ACTION

15. Paragraphs 1 through 14 are repeated with the same force and effect as if stated fully herein.

16. The Coal Sales Tax imposed "nder 26 U.S.C. § 4121, with respect to export sales, is a tax or duty prohibited by the Export Clause, and is therefore unconstitutional and void ab initio.

17. The defendant's exaction of the Coal Sales Tax on export sales violates the Fifth Amendment of the United States Constitution which provides that "No person shall . . . be deprived of life, liberty or property, with-

out due process of law; nor shall private property be taken for public use without just compensation."

18. Plaintiffs have paid such taxes on exports which were unconstitutionally imposed, and assessed on export sales.

AS AND FOR A THIRD CAUSE OF ACTON

19. Paragraphs 1 through 18 are repeated with the same force and effect as if stated fully herein.

20. The Coal Sales Tax imposed under 26 U.S.C. § 4121, with respect to export sales, is a tax or duty prohibited by the Export Clause, and is therefore unconstitutional and void *ab initio*.

21. Plaintiffs have paid such taxes on exports which were unconstitutionally imposed, and assessed on export sales. Monies so exacted must be refunded based upon an implied contract with the government for their return.

REQUEST FOR JUDGMENT AND RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter a judgment and order against the United States, granting each plaintiff separately and individually the following:

a. On the First Cause of Action: a declaration that the tax laid against Plaintiffs' export sales of coal is an unconstitutional exaction of a tax on exports in violation of the Export Clause of the United States Constitution, and an award of damages consisting of a refund of those Coal Sales Tax payments which

were made by Plaintiffs in connection with exports of coal, together with appropriate interest, costs, and attorney's fees;

b. On the second Cause of Action: a declaration that the defendant's exaction of the unconstitutional Coal Sales Tax on export sales violates the Fifth Amendment to the United States Constitution, and an award of damages consisting of a refund of those Coal Sales Tax payments which were made by Plaintiffs in connection with exports of coal, together with appropriate interest, costs, and attorney's fees;

c. On the Third Cause of Action: a declaration that the defendant's exaction of the unconstitutional Coal Sales Tax on export sales creates an implied contract with the government for the return of illegally collected monies, and an award of damages consisting of a refund of those Coal Sales Tax payments which were made by Plaintiffs in connection with exports of coal, together with appropriate interest, costs, and attorney's fees, together with such other and further relief as this Court may deem just and proper.

Respectfully Submitted,

COUDERT BROTHERS

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Date: [April 27, 2000]

SCHEDULE A

1. CLINTWOOD ELKHORN MINING COMPANY
2. GATLIFF COAL COMPANY
3. PREMIER ELKHORN COAL COMPANY

APPENDIX G

UNITED STATES COURT OF FEDERAL CLAIMS

ANDALEX RESCOURCES, INC., ET AL., NO. 99-268 T; BLACK ROCK COAL, INC. ET AL., NO. 00-245 T; BLUESTONE COAL CORP., NO. 00-634 T; BUFFALO MINING CO., ET AL., NC 98-414 T; CHISOLM COAL CO., NO. 00-457 T; CLINTWOOD ELKHORN MINING CO., ET AL., NO. 00-249 T; CONCEPT MINING, INC., ET AL., NO. 00-244 T; CONSOL OF KENTUCKY INC., ET AL., NO. 99-299 T; COVENANT COAL CORP., NO. 00-243 T; CYPRUS CUMBERLAND RESOURCES CORP., ET AL., NO. 98-557 T; CYPRUS PLATEAU MINING CORP., ET AL., NO. 98-200 T; EVERGREEN MINING CO., ET AL., NO 01-252 T; HOBET MINING, INC., ET AL., NO. 00-218 T; KNOX CREEK COAL CORP., ET AL., NO. 00-216 T; LEECO, INC., ET AL., NO. 00-248 T; LIGHTNING INC., 00-762 T; MID-VOL LEASING, INC., ET AL., NO. 00-247 T; MOUNTAIN COAL CO., ET AL., 99-301 T; OMAR MINING CO., ET AL., NO. 01-423 T; PACIFIC COAST COAL CO., NO. 00-236 T; PEABODY COAL CO., ET AL., NO. 99-298 T; PEN COAL CORP., ET AL., NO. 00-250 T; POWDER RIVER COAL CO., NO. 01-422 T; RAPOCA ENERGY CO., NO. 00-242 T; RED RIVER COAL CO., INC., NO. 00-246 T; SOUTHERN MINERALS, INC., NO. 00-467 T; TERRY EAGLE LIMITED PARTNERSHIP ET AL., NO. 00-148 T; CYPRUS AMAX COAL CO., ET AL., NOS. 97-68 T, 97-310 T, 97-311 T, 97-317 T, 97-521 T, AND 97-522 T (CONSOLIDATED); AND K & J COAL CO., INC., NO. 02-200 T, PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

[Filed: Nov. 25, 2002]

DEFENDANT'S PROTECTIVE MOTION FOR PARTIAL DISMISSAL OR FOR PARTIAL SUMMARY JUDGMENT

Before: Judge HODGES.

Under RCFC 12(b)(1), the defendant protectively moves for dismissal of all taxable quarters for which the plaintiffs have failed to file timely refund claims on the ground that this Court lacks jurisdiction of the subject matter. In the alternative, the defendant asks the Court to grant it partial summary judgment under RCFC 56 and to limit the plaintiffs' recovery to the three-year period Congress established in Code § 6511. The defendant expects the Court to deny this motion, perhaps summarily.

Although the Court of Appeals for the Federal Circuit has not yet considered most of the arguments the defendant advances in the accompanying brief, they are at least inconsistent with *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 1065 (2001). The trial attorneys file this motion to preserve their client's arguments for a possible appeal. The Justice Department has not yet decided if it will authorize an appeal.

Respectfully submitted,

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Nov. 25, 2002

APPENDIX H

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article 1, Section 9, Clause 5 of the United States Constitution (the Export Clause) provides:

> No Tax or Duty shall be laid on Articles exported from any State.

2. Section 6511 of Title 26 of the United States Code provides, in relevant part:

Limitations on credit or refund

(a) Period of limitation on filing claim

Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

(b) Limitation on allowance of credits and refunds

(1) Filing of claim within prescribed period

No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.

* * * * *

3. Section 6532 of Title 26 of the United States Code provides, in relevant part:

Periods of limitation on suits

(a) Suits by taxpayers for refund

(1) General rule

No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

(2) Extension of time

The 2-year period prescribed in paragraph (1) shall be extended for such period as may be agreed upon in writing between the taxpayer and the Secretary.

* * * * *

4. Section 7422 of Title 26 of the United States Code provides, in relevant part:

Civil actions for refund

(a) No suit prior to filing claim for refund

No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax

alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

* * * * *

5. Section 1346 of Title 28 of the United States Code provides, in relevant part:

United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

> (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

* * * * *

6. Section 1491 of Title 28 of the United States Code provides, in relevant part:

Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the

Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. * * *

* * * * *

7. Section 2411 of Title 28 of the United States Code provides:

Interest

In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under section 6621 of the Internal Revenue Code of 1986 upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue. The Commissioner is authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, whether or not a claim for such payment has been duly filed, and such tender shall stop the running of interest, whether or not such refund check is accepted by the judgment creditor.

8. Section 2501 of Title 28 of the United States Code provides, in relevant part:

Time for filing suit

Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

* * * * *